IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION (L) NO.218 OF 2006

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Tulip Hospitality Services Ltd.
and ors. ...Petitioners

v/s.

Siddhivinayak Realties Pvt.
Ltd. ...Respondents

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Mr.V.R.Manohar with Mr.S.H.Doctor, Ms.Usha Purohit and R.Vashist i/b M/s.Advani & Co. for the Petitioners.

Mr.Aspi Chinoy with Mr.Janak Dwarkadas and Mr.P.K.Shroff i/b P.K.Shroff & co. for the

Respondents.

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CORAM: D.K.DESHMUKH, J.

DATED: 4TH MAY, 2006

P.C.:

Admit. Heard finally by consent of parties.

2. The facts which are relevant and material for deciding this petition are that the Respondent Siddhivinayak Realties Pvt. Ltd. had filed Arbitration Petition No.434 of 2005 in this Court under Section 9 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the "Act"), seeking certain interim orders.

3. By order dated 24-1-2006, the Arbitration Petition No.434 of 2005 was admitted for final hearing, and ad-interim order in terms of prayer clause (a) of that Petition was made. The parties

were also directed by that order to maintain status-quo. It may be pointed out here that at that time the arbitrator in terms of the arbitration clause was yet to be appointed.

4. Arbitration Petition No.434 of 2005 came up for final hearing before the Court on 8th March, 2006. By that date the arbitrator was already appointed, and therefore, without hearing the matter further the court by consent of the parties directed that the order dated 24-1-2006 granting ad-interim in terms of prayer clause (a) and directing the parties to maintain status-quo should be treated as final order in that petition with liberty to the parties to apply before the arbitrator for cancellation or modification of the order. The parties were also granted liberty to make application for appropriate interim reliefs before the learned arbitrator.

5. It appears that the present Petitioner applied before the learned arbitrator for modification of the order made by the court in Arbitration Petition No.434 of 2005. That application was disposed of by the learned arbitrator by order dated 26th April,2006.

6. From the order of the learned arbitrator, it appears that the learned arbitrator has taken a view that because the order dated 8th March, 2006 passed in Arbitration Petition No.434 of 2005 is a final order passed in that petition, the parties can apply for modification and cancellation of that order before the arbitrator only if there is change in the circumstances prevailing on the date of that order. It is this order of the learned arbitrator which is challenged in the present petition.

7. I have heard the learned Counsel for both sides.

8. Section 9 of the Act confers powers on the court to grant interim measures of protection at the instance of a party before or during the arbitral proceedings. The court can make an order for interim measures of protection even after the award is made till it becomes enforceable. Thus, under Section 9 the court can make interim orders that may be necessary in the facts and circumstances of the case before the commencement of the arbitral proceedings as also during the pendency of the arbitral proceedings. So far as the period, when the arbitral

proceedings are pending is concerned, Section 17 of the Act confers powers on the arbitral tribunal also to make order for any interim measures of protection. Therefore, it is clear that so far as the period when arbitral proceedings are pending, the Act confers powers on the court as also the arbitrator to make orders for interim measures of protection. The powers conferred on the court by Section 9, so far as the period when arbitral proceedings are pending, is wider than the powers conferred by Section 17 on the arbitrator. The powers under Section 17 cannot be exercised by an arbitrator, if there is an agreement to the contrary between the parties and the interim order that an arbitrator makes under Section 17 is always directed to a party. Though the powers under Section 9 conferred on the court are wider than the powers conferred on the arbitrator under Section 17, there is a definite common area over which the powers under Section 17 and the powers under Section 9 operate. In other words, when arbitration is pending some type of orders can be made by the Court as also the arbitrator. I have consistently taken a view that in far as this common area is concerned, as far as possible the court should permit the arbitral tribunal to exercise the powers. Firstly, because

compared to Section 9, Section 17 is a special provision. Secondly, because the arbitral tribunal is seized of the entire matter and therefore is in a better position to appreciate the controversy between the parties and to make an interim order. Thirdly, against an order made by the arbitrator under Section 17, Section 37 provides an appeal to the court. Therefore, if the court makes an interim order under Section 9 on a subject on which the arbitrator could have made the order under Section 17, the court deprives the parties a remedy of appeal and therefore for all these reasons, I have always taken a view that when the arbitral proceedings are pending, a party approaches the court under Section 9, if the interim order sought by the party is capable of being made by the arbitrator under Section 17, then court should decline to entertain the petition and instead direct the parties to approach the arbitrator under Section 17. The orders dated 24-1-2006 and 8-3-2006 passed by me in Arbitration petition No.434 of 2005 have to be looked at from this point of view. When I heard the Arbitration Petition No.434 of 2005 on 24-1-2006, the arbitrator was yet to be appointed and therefore the parties were heard and an interim order was made. When that petition came up for final

hearing on 8th March, 2006, the arbitrator was already appointed and interim order that was sought in Arbitration Petition No.434 of 2005 was such as could have been made by the arbitrator under Section 17 also, and therefore as the parties were agreed, I disposed of the petition in terms of the ad-interim order and granted liberty to the parties to approach the arbitrator for any further interim reliefs as also for cancellation or modification of the order passed in Arbitration Petition No.434 of 2005. It is clear from the orders dated 24-1-2006 and 8-3-2006 that I had heard the parties on 24-1-2006 for the purpose of making ad-interim order, but I did not find it necessary to hear the parties further for making final order in that petition, because the arbitrator by that date was already appointed, before whom the parties could have gone and argued the matter and therefore liberty was granted to the parties to apply for cancellation or modification of the order passed by the court. In my opinion, had it been the intention of the court that the parties can apply for cancellation or modification of the order passed in Arbitration Petition No.434 of 2005, only if there is a change in the circumstances, it was not necessary for the court to grant any liberty. The

parties could have applied for modification of the interim order, in case there is a change in the circumstances, as a matter of right either before this court under Section 9 or before the arbitrator under Section 17. It became necessary for the court to grant liberty to the parties to apply for cancellation or modification of the order passed in Arbitration Petition No.434 of 2005, because the court wanted to grant liberty to the parties to apply for cancellation or modification of the order in the existing facts and circumstances.

9. Perusal of the order passed by the learned arbitrator shows that the learned arbitrator has declined to consider the application made by the Petitioner on merits only because according to the learned arbitrator the Petitioner could not have applied for modification of the order unless there is change in the circumstances. In my opinion, as the intention of the court in granting liberty to the parties to apply for cancellation or modification was to permit the parties to apply in the existing facts and circumstances of the case and not necessarily due to change in the circumstances, the learned arbitrator should not have declined to consider the

application on merits.

10 . In this view of the matter, therefore, the order dated 27th April, 2006 made by the learned arbitrator which is impugned in this petition is set aside. The learned arbitrator is requested to reconsider the application made by the Petitioner afresh on its own merits without being influenced either by the order dated 24-1-2006 or 8-3-2006 and decide the application on its own merits.

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